Soorya Kumar a/l Narayanan & Anor v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NOS 05–149 OF 2010(P) AND 05–153 OF 2010(P)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND ABDULL HAMID EMBONG FCJJ
5 NOVEMBER 2012

Criminal Law — Appeal — Conviction and sentence, against — Appellants charged with trafficking in dangerous drugs — Whether trial judge erred by using double presumptions to find trafficking — Whether erroneous for trial judge to rely solely on weight of drugs seized to infer trafficking — Whether present case could be distinguished from Public Prosecutor v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193 — Whether appellants' defence cast reasonable doubt on prosecution's case — Whether preferred charge should be reduced to one of mere possession — Dangerous Drugs Act 1952 ss 6, 37(d), 37(da), 39A & 39B(1)

On 28 August 2000, the two appellants were arrested in an ambush laid by a police party near a bridge situated in Seberang Perai, Pulau Pinang. While lying in wait, the police team had heard the sound of a motor boat coming towards the river bank. Shortly thereafter a lorry bearing a fake number plate had parked under the bridge and the two appellants had alighted. The first appellant, who alighted from the driver seat of the lorry, and the second appellant, who alighted from passenger side, were then seen collecting eight plastic sacks from the boat and loading the same onto the lorry before driving off. At that moment the police team moved in to arrest them. The appellants were arrested after a slight struggle but the motor boat managed to escape. The plastic sacks were seized and upon inspection found to contain compressed slabs of dried plant materials, which a chemist later confirmed to be 197,246.9g of cannabis, a prohibited drug under the Dangerous Drugs Act 1952 ('the Act'). The appellants were charged with drug trafficking under s 39B(1)(a) of the Act read with s 34 of the Penal Code. At the close of the prosecution case, the trial judge found that the appellants had care and custody of the drugs and that upon reliance on the presumption under s 37(d) of the Act they also had knowledge that the plastic sacks contained the drugs while they were in their care and custody. The trial judge went on to conclude that there was a prima facie case for the offence of trafficking based solely on the quantity of the drugs involved in the case. The main defence of the appellants was lack of knowledge of the drugs found in the plastic bags. The first appellant claimed that he was told by one Babuji to go to a place and pick-up smuggled batik clothes, while the second appellant testified that the first appellant had told him that the plastic sacks contained smuggled batik clothes. The trial judge did not accept the appellants' version of events and convicted them of

trafficking and sentenced them to death. Upon appeal the Court of Appeal affirmed the High Court orders. This was the appellants appeal against the decisions of the courts below. In this appeal the appellants contended, inter alia, that the trial judge had erred in relying on the presumption for trafficking under s 37(da) of the Act as he had already relied on s 37(d) of the Act for presumed knowledge. The appellants also submitted that it erroneous for the trial judge to solely rely on the weight of the drugs seized to infer trafficking. The prosecution maintained that it was correct for the trial judge to make an inference of trafficking based on the weight of the drugs found in the care and custody of the appellants.

Held, allowing the appeal against conviction and sentence:

(1) In the present case, the trial judge had relied on the statutory presumption under s 37(d) of the Act to establish presumed knowledge, because there was no evidence upon which an inference could be made that the appellants had known the contents of the plastic sacks. Having relied on this presumed knowledge the trial judge went on to conclude that there was a prima facie case for the offence of trafficking based solely on the quantity of the drugs involved in the case. However, based on the facts and circumstances of this case, the trial judge should have been slow in making the inference of trafficking based solely on the quantity of the drugs involved in the case (see paras 22–24,28).

(2) The present case could be distinguished from that of*Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 (*Manaf*'s case) in that except for the large quantity of drugs found in both cases, the circumstances when the drugs were found differed. There were two factors considered in *Manaf*'s case that led to the inference of trafficking, namely, 'the manner the drug was being carried' and 'the total amount of the drug involved' but the same could not be said in the present case. There was no evidence that the appellants had the opportunity to open and check the contents of the plastic sacks. The fact that the plastic sacks were heavy proved nothing, especially since no evidence was adduced to show the comparable weight of one plastic sack of batik clothes so as to allow an inference that the apparent weight of the contents of the plastic sacks could not have been batik clothes as asserted by the appellants. Thus, the trial judge had erred in making an inference of trafficking solely on the quantity and weight of the drugs found in the absence of any other facts such as found in *Manaf*'s case (see paras 28–34).

(3) It was quite unreasonable for the trial judge and the judges of the Court of Appeal to come to the conclusion that the appellants were drug trafficking, since it was possible to draw an inference of knowledge of either trafficking drugs or smuggling batik clothes from the facts (see para 33).

(4) Even if the defence was called, the appellants' version should not have been simply brushed aside as done in the present case. The appellants had stated at the first available opportunity, i.e. in their cautioned statement that one Babuji had asked them to pick up smuggled batik clothes. Thus, it was difficult to dismiss such an assertion as an afterthought (see para 35).

(5) In the circumstances there was no evidence adduced to warrant an affirmative finding of trafficking in this case and if not for the invocation of the statutory presumption the trial judge would not have been able to find *mens rea* possession on the part of the appellants. Accordingly, the present case was a proper one in which the preferred charge should have been reduced to one of mere possession under s 6 read with s 39A of the Act. Appropriate punishment would be imposed after due consideration of the appellants' mitigation (see paras 36–39).

[Bahasa Malaysia summary

Pada 28 Ogos 2000, dua perayu telah ditangkap dalam serbuan yang dilakukan oleh pasukan polis berdekatan jambatan yang terletak di Seberang Perai, Pualau Pinang. Semasa menunggu, pasukan polis itu telah mendengar bunyi motor bot yang menuju ke tebing sungai. Sejurus selepas itu sebuah lori dengan nombor plat palsu telah berhenti di bawah jambatan itu dan dua perayu turun darinya. Perayu pertama, yang turun dari tempat duduk pemandu lori itu, dan perayu kedua, yang turun dari belah penumpang, kemudian dilihat mengumpul lapan bungkusan plastik dari bot itu dan memasukkan ke dalam lori itu sebelum memandu pergi. Pada saat itu pasukan polis menyerbu untuk menangkap mereka. Perayu-perayu telah ditangkap selepas pergelutan kecil tetapi motor bot itu berjaya melepaskan diri. Bungkusan plastik tersebut telah dirampas dan setelah diperiksa adalah didapati mengandungi bahan mampat tumbuhan kering, yang disahkan oleh ahli kimia sebagai kanabis seberat 197,2.9g, iaitu dadah yang dilarang di bawah Akta Dadah Berbahaya 1952 ('Akta'). Perayu-perayu telah dituduh mengedar dadah di bawah s 39B(1)(a) Akta tersebut dibaca dengan s 34 Kanun Keseksaan. Di penutup kes pendakwaan, hakim perbicaraan mendapati bahawa perayu-perayu tersebut mempunyai jagaan dan kawalan dadah tersebut dan bahawa berdasarkan kebergantungan terhadap andaian di bawah s 37(d) Akta tersebut mereka juga mengetahui bahawa bungkusan plastik tersebut mengandungi dadah pada masa ia dalam jagaan dan kawalan mereka. Hakim perbicaraan membuat kesimpulan bahawa terdapat kes prima facie untuk kesalahan pengedaran berdasarkan semata-mata pada kuantiti dadah yang terlibat dalam kes ini. Pembelan utama perayu-perayu adalah tiada pengetahuan tentang dadah tersebut yang telah dijumpai dalam beg plastik itu. Perayu pertama mendakwa bahawa dia diberitahu oleh Babuji untuk pergi ke suatu tempat dan mengambil pakaian batik yang diseludup, manakala perayu kedua memberi keterangan bahawa perayu pertama telah memberitahunya

bahawa bungkusan plastik itu mengandungi pakaian batik yang diseludup. Hakim perbicaraan tidak menerima versi kejadian perayu-perayu dan mensabitkan mereka kerana pengedaran dan menjatuhkan hukuman mati ke atas mereka. Setelah membuat rayuan Mahkamah rayuan telah mengesahkan perintah-perintah Mahkamah Tinggi. Ini adalah rayuan perayu-perayu terhadap keputusan-keputusan mahkamah bawahan. Dalam rayuan ini perayu-perayu berhujah, antara lain, bahawa hakim perbicaraan terkhilaf apabila menggunakan andaian untuk pengedaran di bawah s 37(da) Akta tersebut kerana beliau telahpun menggunakan s 37(d) Akta tersebut untuk andaian pengetahuan. Perayu-perayu juga berhujah bahawa hakim perbicaraan terkhilaf kerana hanya bergantung kepada berat dadah yang dirampas untuk membuat inferens pengedaran. Pendakwaan menegaskan bahawa adalah wajar untuk hakim perbicaraan membuat inferens pengedaran berdasarkan berat dadah yang didapati dalam jagaan dan kawalan perayu-perayu.

Diputuskan, membenarkan rayuan terhadap sabitan dan hukuman:

(1) Dalam kes ini, hakim perbicaraan bergantung kepada andaian statutori di bawah s 37() Akta tersebut untuk membukikan andaian pengetahuan kerana tiada keterangan di mana inferens boleh dibuat bahawa perayu-perayu mengetahui tentang kandungan bungkusan-bungkusan plastik tersebut. Dengan bergantung kepada andaian pengetahuan ini hakim perbicaraan membuat kesimpulan bahawa terdapat kes prima facie kerana kesalahan pengedaran berdasarkan semata-mata pada kuantiti dadah yang terlibat dalam kes ini. Walau bagaimanapun, berdasarkan fakta dan keadaan kes ini, hakim perbicaraan patut tidak cepat membuat inferens pengedaran berdasarkan semata-mata kuantiti dadah yang terlibat dalam kes ini (lihat perenggan 22–24, 28).

(2) Kes ini boleh dibezakan daripada kes *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193('kes *Manaf*') di mana kecuali kerana kuantiti dadah yang banyak ditemui dalam kedua-dua kes, keadaan di mana dadah tersebut ditemui adalah didapati berbeza. Terdapat dua faktor yang diambilkira dalam kes *Manaf* yang membawa kepada inferens pengedaran, iaitu, 'cara pembawaan dadah tersebut' dan 'jumlah keseluruhan dadah yang terlibat' tetapi yang sama tidak boleh dikatakan dalam kes ini. Tiada keterangan bahawa perayu-perayu mempunyai peluang untuk membuka dan memeriksa kandungan bungkusan-bungkusan plastik tersebut. Fakta bahawa bungkusan-bungkusan plastik itu berat tidak membuktikan apa-apa, terutama jika tiada keterangan dikemukakan untuk menunjukkan perbezaan berat bungkusan plastik pakaian batik itu bagi membenarkan inferens yang mana berat nyata kandungan bungkusan plastik itu tidak mungkin pakaian batik itu sebagaimana ditegaskan oleh perayu-perayu. Oleh itu, hakim perbicaraan telah terkhilaf dalam membuat inferens pengedaran semata-mata berdasarkan kuantiti dan berat dadah yang

ditemui dengan ketidakhadiran apa-apa fakta lain sebagaimana didapati dalam kes *Manaf* (lihat perenggan 28–34).

(3) Adalah tidak munasabah untuk hakim perbicaraan dan hakim-hakim Mahkamah Rayuan membuat kesimpulan bahawa perayu-perayu mengedar dadah, kerana adalah berkemungkinan untuk membuat inferens pengetahuan sama ada pengedaran dadah atau penyeludupan pakaian batik berdasarkan fakta-fakta (lihat perengan 33).

(4) Walaupun pembelaan dipanggil, versi perayu-perayu tidak boleh diketepikan begitu sahaja sepertimana yang dilakukan dalam kes ini. Perayu-perayu telah menyatakan pada peluang kali pertama lagi, iaitu dalam kenyataan beramaran mereka bahawa seorang bernama Babuji telah meminta mereka mengambil pakaian batik yang diseludup itu. Oleh itu, adalah sukar untuk menolak penegasan sedemikian sebagai suatu yang telah difikirkan kemudian (lihat perenggan 35).

(5) Dalam keadaan berikut tiada keterangan telah dikemukakan untuk mewajarkan kewujudan penemuan pengedaran dalam kes ini dan jika bukan kerana penggunaan andaian statutori itu hakim perbicaraan tidak mungkin menemui milikan *mens rea* di pihak perayu-perayu. Oleh demikian, kes ini adalah kes yang wajar di mana pertuduhan yang sesuai patut dikurangkan kepada milikan sahaja di bawah s 6 dibaca dengan s 39A Akta tersebut. Hukuman yang sesuai akan dikenakan selepas pertimbangan wajar terhadap mitigasi perayu-perayu (lihat perenggan 36–39).]

Notes

For a case on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (4th Ed, 2012) para 40.

Cases referred to

Choo Chang Teik & Anor v PP [1992] 1 SCR 475, SCC (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241, CA (refd)
Mohammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
Ong Ah Chuan v PP and Koh Chai Henny v PP [1981] 1 MLJ 64; [1980] 1 LNS 181, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 2 CLJ 129, FC (distd)
Teng Howe Sing v PP [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60, 60(1)
Dangerous Drug Act 1952 ss 6, 37(d), (da), 39A, 39B, 39B(1)(a)
Penal Code s 34

Appeal from: Criminal Appeal Nos P–05–54 of 2007 and P–05–55 of 2007 (Court of Appeal, Putrajaya)

Gurbachan Singh (Bernard George with him) (Bachan & Kartar) for the appellants.
Mangai (Deputy Public Prosecutor, Trials and Appellate Division Attorney General's Chambers) for the respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] The appellants are aggrieved by the decisions of the courts below. On a charge under s 39B(1)(a) of the Dangerous Drug Act 1952 ('DDA') read with s 34 of the Penal Code the trial High Court on 25 June 2007 convicted them of trafficking 197,246.9g of cannabis and sentenced them to death. The Court of Appeal dismissed their appeals against the conviction and sentence on 2 December 2010.

[2] We heard their appeals and we now render our judgment.

BRIEF BACKGROUND

[3] Based on information received on 26 August 2000 PW7 (Inspector Mohd Razi bin Ismail) organised a team consisting of six police officers and 24 police personnel to lay an ambush of an alleged drug trafficking activity near a bridge at Stadium Batu Kawan, Bukit Tambun, Seberang Perai, Pulau Pinang.

[4] The team went to the location at around 4.30am and divided into four groups. Each group took its respective position and waited for the event to happen as alleged in the information received.

[5] At about 4.50am the team heard sound of a motor boat coming towards the river bank. Then soon after a lorry bearing registration no WAX 4394 (later found to be a fake plate) entered the dirt road in a reversed manner and parked under the bridge.

[6] Subsequently two persons alighted. They were the appellants. The second appellant came out from the driver seat while the first appellant from the passenger side. Both then went to the river bank and collected eight plastic sacks dragging one at a time. They loaded the plastic sacks onto the lorry. Prior

to that they unloaded some chairs that were originally on the rear of the lorry. After loading the plastic sacks the appellants loaded back the chairs and thereafter covered the rear of the lorry with canvass.

[7] As the appellants were about to leave the place the police team moved in to arrest them. They were arrested after a slight struggle. The motor boat managed to escape. It would appear that the police team did not prepare for it.

[8] PW7 seized the plastic sacks and upon inspection he found each contained compressed slabs of dried plant materials suspected to be cannabis.

[9] The appellants together with the plastic sacks were then taken to the Pulau Pinang Police Contingent Headquarters for further investigation.

[10] PW7 was also the investigation officer of this case. He, amongst other actions, caused the contents of the plastic sacks to be analysed by the Chemistry Department.

[11] PW4 (Eliza binti Mat Nori) was the chemist who analysed the contents. She found that they were cannabis with the total weight of 197,246.9g and a prohibited drug under the DDA.

BEFORE THE HIGH COURT

[12] At the end of the case for the prosecution the learned trial judge, having duly given the evidence adduced by the prosecution the maximum evaluation, found as a fact that the appellants were having care and custody of the drug. However to find that the appellants had knowledge of the drug in the plastic sacks, an essential ingredient for the element of possession, learned trial judge relied on the presumption as provided under s 37(d) of the DDA in that the appellants were presumed to have the knowledge that the plastic sacks contained the drug while they were in their care and custody.

[13] Having ruled that the appellants were in possession of the drug the learned trial judge went on to consider whether there was a prima facie case for the offence of trafficking. And based solely on the quantity of drug involved the learned trial judge inferred that the drug could not have been for personal consumption but for sale thus provided the element of trafficking. He therefore ruled that the prosecution had established a prima facie case against the appellants for drug trafficking and therefore called for their defence.

[14] In their defence both the appellants denied knowing that the plastic sacks contained drug. The first appellant said that he was told by one Babuji to

go to the place to pick up smuggled batik clothes while the second appellant testified that it was the first appellant who told him that the plastic sacks contained smuggled batik clothes.

[15] At the end of the whole case and having considered the evidence adduced both by the prosecution and the appellants the learned trial judge did not accept the version of the appellants. He ruled that the appellants failed to rebut on the balance of probability the presumption of knowledge as provided under s 37(d) of the DDA. He also held that the appellants failed to cast any reasonable doubt in the prosecution's case while he was satisfied that the prosecution had established its case beyond reasonable doubt on the charge of drug trafficking by the appellants. His reasons for coming to his decision are as follows, inter alia:

(a) that the main defence of the appellants was lack of knowledge of the drug found in the plastic sacks. However, in view of the invocation of s 37(d) of the DDA the burden was on the appellants to rebut the presumption and the learned trial judge held that they failed to do so. He ruled that the cautioned statement of the second appellant (D30) was not sufficient to rebut the presumption without the evidence of Babuji being the person claimed by the first appellant to have told him of the contents of the plastic sacks. He opined that the appellants should have called Babuji as a witness. The learned trial judge further ruled that no adverse inference should be drawn on the failure by the prosecution to call Babuji as a prosecution's witness;

(b) that the appellants went to the place in the early hour of the morning at about 3am;

(c) that the plastic sacks weighed at the average of 30kg each and thus too heavy to be batik clothes;

(d) that the plastic sacks were made of thin material;

(e) that the appellants attempted to run away when arrests were made; and

(f) that the cautioned statement of the second appellant (D30) could not be entirely relied upon to rebut the presumption due to the following discrepancies namely:

(i) in the cautioned statement the second appellant said that the lorry was bought by Babuji while in his evidence in court he said that he was just a part time driver;

(ii) in the cautioned statement the second appellant said that he was initially paid by Babuji RM500 for the work with a promise of another RM4,500 later on yet nothing was said about payment in his evidence in court;

(iii) in the cautioned statement the second appellant said that it was Babuji who gave him the telephone number of the first appellant and it was him who called the first appellant. However in his evidence in court the second appellant denied knowing the telephone number of the first appellant and that it was the first appellant who called him; and

(iv) in the cautioned statement the second appellant said that the first appellant told him at Juru tollgate that the things to be picked up were smuggled goods while in his evidence in court he said that he was only told by the first appellant of the contents of the plastic sacks while they were carrying them.

[16] Accordingly the learned trial judge found the appellants guilty of the offence as charged and sentenced them to death.

BEFORE THE COURT OF APPEAL

[17] In dismissing their appeals the Court of Appeal found that the learned trial judge was correct in his finding of care and custody of the drug and his reliance on the presumption of knowledge under s 37(d) of the DDA in relation to the element of possession.

[18] In respect of the charge for trafficking the Court of Appeal came to the following findings, namely:

(a) that it was undeniable that the amount of cannabis seized was huge ie about 197kg. No clever argument could convince us that the drug seized were for personal consumption (*Ong Ah Chuan v Public Prosecutor and Koh Chai Henny v Public Prosecutor* [1981] 1 MLJ 64; [1980] 1 LNS 181; *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 2 CLJ 129). Basic common sense persuaded us that if that huge amount seized was not meant for personal consumption then it must be for the open market;

(b) that this case involves nothing short of an elaborate set-up and logically must be quite a costly enterprise. How could it not be as the evidence showed that the drug were ferried by a boat from some embarkation point and thereafter unloaded in the early hours of the day at the appointed place, and precisely about that time, a lorry comes along to assume responsibility? No less than four persons were involved in this operation too;

(c) that the scenario of the evidence painted by the prosecution and strengthened by the appellants' testimony showed synchronisation,

professionalism and a well planned illegal act by them. The whole operation:

(i) involved people from Kuala Lumpur and Penang;

(ii) was spiced with a dash of international element as the gunny sacks had Thai characters on them;

(iii) was efficiently undertaken as the whole exercise was completed in a short while;

(iv) took place very early in the morning ie 4.50am;

(v) the appellants knew the size of the drug as they brought a lorry along;

(vi) the registration number of WAX 4394 was a fake one. This was confirmed by SP6 when he said that the registration number was for a van (Ford Econoven) and not a lorry (Isuzu);

(vii) they must have pre-planned and timed their arrival with that of the two men in the boat;

(viii) they drove from the main road onto the track road in a reverse manner as if they knew the precise location where the boat would stop;

(ix) they unerringly halted and waited where the boat would berth as if they had done this before;

(x) they were well prepared as they used the furniture brought from Kuala Lumpur to hide the drug from prying eyes; and

(xi) they put up a struggle when arrested and in the course of which A1 was injured (*Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717; *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46; [2009] 3 CLJ 733).

(d) that all the above early preliminary acts, like meeting up at the Juru plaza toll, the preparatory acts, the overt conduct and the like, and the huge amount of cannabis seized confirmed that this was not a case of passive possession but outright trafficking; and

(e) that with the ingredients of knowledge (on a balance of probability), and trafficking (on reasonable doubt), unrebutted, we found that the prosecution had proven its case beyond reasonable doubt. We henceforth dismissed the appeals and affirmed the High Court orders.

BEFORE THIS COURT

[19] Before us several grounds of appeal were submitted. However during

A the hearing learned counsel for the appellants focused on the issue of knowledge. He contended that the appellants did not have the knowledge about the drug inside the plastic sacks. As such he submitted that at the highest there was only the offence of passive possession of the drug. He went on to say that there was no evidence adduced by the prosecution to establish B affirmatively the offence of trafficking. And in this case it was necessary for the learned trial judge to make such affirmative finding of fact for trafficking since he could no longer rely on the presumption for trafficking under s 37(da) of the DDA as he had already relied on s 37(d) for presumed knowledge.

C **[20]** It was further submitted that it was erroneous for the learned trial judge to solely rely on the weight of the drug to infer trafficking. Such exercise would tantamount to relying on the presumption for trafficking contrary to the established legal principle of prohibiting the use of double presumptions to find trafficking under the DDA. Learned counsel cited the case of *Mohammed* D *bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170.

[21] In response the learned deputy public prosecutor submitted that it was correct for the learned trial judge to make an inference for trafficking based on the weight of drug found with the appellants. And it was also urged upon us E that in view of the weight of the drug plain common sense should dictate the existence of trafficking. Learned deputy also highlighted to us the provision of s 60(1) of the Courts of Judicature Act 1964 ('CJA') to maintain the conviction for trafficking since on the facts of this case no miscarriage of justice would occur.

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[22] Now, as discussed above there is no dispute:

(a) that the drug found was cannabis, a class of prohibited drug under the DDA; and

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(b) that the drug was in the care and custody of the appellants when they were arrested by the police.

[23] However, the learned trial judge acknowledged that there was no H evidence upon which an inference could be made that the appellants must have known the contents of the plastic sacks. As such he relied on the statutory presumption under s 37(d) of the DDA. It means the appellants were presumed to have known about the drug found inside the plastic sacks unless they could prove to the contrary on the balance of probability.

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[24] Having relied on the presumption of knowledge for the element of possession the learned trial judge then made an inference solely based on the large quantity and weight that the drug found was for sale and not for personal consumption. And on that score he called for the defence.

[25] Thus, in our view the first issue to consider is whether the learned trial judge was correct in law in making such an inference. Learned deputy argued that it is permissible in law and cited the case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193;; [2006] 2 CLJ 129.

[26] We are inclined to agree with the learned deputy that in law it is permissible to make reasonable inferences if the facts and circumstances so warrant. Indeed this is what was said in *Manaf*'s case at p 207:

> Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption.

[27] But at the same time it must also be borne in mind what was said by our then Supreme Court in the case of *Choo Chang Teik & Anor v Public Prosecutor* [1992] 1 SCR 475 at p 425 (MLJ); p 481:

> We feel that in offences involving capital punishment such as trafficking in drug, evidence by inference alone was not sufficient to base a conviction of the appellant.

[28] Accordingly, having considered the facts and circumstances of this case we are of the view that the learned trial judge should have been slow in making the inference of trafficking based solely on the quantity of drug found. This case can be distinguished from that of *Manaf*'s case. For instance, except for the large quantity of drug found in both cases, the circumstances when the drugs were found differed. In this case the drug was found in bulk inside the plastic sacks. In *Manaf*'s case the accused was travelling in a taxi when he was caught with the drug packed in small packets and tucked at his waist as well as inside the pockets of his track top and trousers.

[29] It is therefore reasonable and plain common sense to infer in *Manaf*'s case that the accused must have known of the existence of the drug and in view of the large quantity and the manner it was packed it could reasonably be inferred that it was for sale and thus satisfied the element of trafficking. In our view there were two factors considered in *Manaf*'s case that led this court to make the inference of trafficking, namely, 'the manner the drug was being carried' and 'the total amount of the drug involved'.

[30] But the same cannot be said in the present case. The appellants merely loaded the plastic sacks onto the lorry. There was no evidence that they had the opportunity to open any of the plastic sacks to check their contents. Meanwhile, each of the plastic sacks must have been heavy since each had to be

dragged by the appellants from the river bank onto the back of the lorry. But such fact proves nothing. No evidence was adduced to show the comparable weight of one plastic sack of batik clothes so as to allow an inference that the apparent weight of the contents of the plastic sacks could not have been batik clothes as asserted by the appellants.

[31] At best therefore is that the appellants were caught while carrying the drug from the river bank onto the lorry. And it was said in *Manaf*'s case and which we agree that 'the mere act of carrying is not sufficient to constitute the offence of trafficking.'

[32] We have also considered the views expressed by the Court of Appeal in upholding the decision of the learned trial judge. With respect, they merely relied on the suspicious conduct and behavior of the appellants while failing to note adequately the basic defence of the appellants alluded to in the cautioned statement (D30), namely that they were asked by one Babuji to pick up smuggled batik clothes, an illegal act no doubt and itself would likely involve the same suspicious conduct and behavior as seen in this case.

[33] As such it was quite unreasonable for the learned trial judge and the Court of Appeal to come to such conclusion or inference as they did in this case since the facts and circumstances could draw an inference of knowledge of either trafficking drug or smuggling batik clothes.

[34] Thus, in our view on the facts and circumstances of this case the learned trial judge erred in making an inference of trafficking solely on the quantity and weight of drug found in the absence of the other facts such as found in *Manaf*'s case. If the learned trial judge did not make the inference he would not have called for the appellants to enter their defence on the charge preferred. Indeed in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 the Court of Appeal said this at p 249:

> To summarise, the fact that the accused is transporting a quantity of drug from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drug and any transaction the accused proposed to enter into.

[35] Even if the defence was called the version of the appellants should not have been simply brushed aside as done in this case. It should be noted that they did state at the first opportunity available in the form of the cautioned statement (D30) that it was a person by the name of Babuji who asked them to go to the place to pick up smuggled batik clothes. Thus, it is difficult to say that such assertion was an afterthought.

[36] We are therefore inclined to agree with the contention of learned counsel for the appellants that there was no evidence adduced to warrant an affirmative finding of trafficking in this case. Indeed if not for the invocation of the statutory presumption by the learned trial judge he would have been unable to find mens rea possession on the part of the appellants.

[37] Learned deputy also urged us to consider the provision of s 60 of the CJA as was done in *Manaf*'s case. With respect, the facts and circumstances of this case do not justify such invocation. To do so would more likely occasion injustice to the appellants.

[38] Accordingly we are of the view that this is a proper case in which the preferred charge should have been reduced to one of mere possession at the end of the case for the prosecution under s 6 of the DDA read with s 39A of the same Act.

[39] We therefore set aside the conviction of the appellants for trafficking under s 39B of the DDA and substitute it with one of possession under s 6 read with s 39A of the DDA. We also set aside the sentence passed against the appellants. We now call for their mitigation before we consider the appropriate punishment to impose against them.

Appeal against conviction and sentence allowed.

Reported by Kohila Nesan